"Whether, upon the facts of the case as accepted by the trial Court and accordingly by the appellate Court, — namely, that the appellant, an employee of the Penang Port Commission, had been given the two damaged packets of tea within the Penang Port Commission area by a servant or agent of the consignee before they had been cleared — the appellate Court was right in law in drawing, as a necessary inference, the conclusion that the appellant had committed the offence of theft (as distinct from, at its worst, a mere disciplinary offence against his employers), in that he had intentionally taken dishonestly the two said packets of tea out of the possession of the Penang Port Commission".

The learned Judge accepted in general the learned President's findings of fact and accordingly the answer to the reference will have to be based upon the learned President's findings of fact.

I do not think it is necessary for me to refer to the evidence in detail or to all the learned President's findings of fact. I would however like to refer to one finding which I consider vital, and that is his finding appearing at both page 26 and page 27 of the Record that D.W. 3 was an honest and truthful witness.

D.W. 3 was an employee of the consignee of the tea the subject of the charge. D.W. 3 said that he picked up the 2 packets of tea, Exhibit P. 1, which were part of his firm's consignment, from the floor of the wharf by a crane some 50 feet away from the crane at which the respondent was working. He then walked over to the respondent and gave him the 2 packets. On his own evidence, when originally offered the packets of tea, the respondent said:—

"I refused because I might be in trouble . . . . I told him I did not want the 2 packets".

The owner of the tea, the consignee, D.W. 3's employer, did not ask for a survey of the relevant consignment (this appears at page 10, line A2 of the Record) and accordingly there was no loss to the Penang Port Commission.

Two points arise as a result of this evidence. Firstly was it not D.W. 3 who took the tea out of the possession of the Penang Port Commission and not the respondent? Secondly was there any evidence to show that D.W. 3 did or did not have the permission of his employer, the consignee, to give away small quantities of damaged packets of tea ?

In my view it was D.W. 3 who took the tea out of the possession of the Penang Port Commission and there was nothing to show that D.W. 3 did not have his employers permission in such circumstances to give away small quantities of tea. That he may well have had such permission is supported by the fact that no survey was asked for by the consignee, presumably because the quantity of the consignment which was damaged was so negligible.

The fact that the Penang Port Commission suffered no loss does not of course mean that the respondent did not cause a wrongful gain to himself. But in the light of the evidence, or its limitations, can it be said that the necessary inference is that the respondent had committed the offence of theft? Has it been shown as a necessary inference that his intention in taking the tea was dishonest? It is to my mind not a necessary inference. He was given no opportunity to say what he meant by the words, to which I have already referred, which he spoke when originally offered the packets of tea. Could not the trouble to which he referred have been a reference to a breach of the regulations of the Penang Port Commission which would result in disciplinary action? If that was so can it be said that the charge has been proved beyond reasonable doubt? I do not think it can. If D.W. 3 had his employer's permission to give away small quantities of a consignment a negligible quantity of which had been damaged, it would not be an unreasonable inference that the respondent had no dishonest intention when accepting the 2 packets of tea, even if he knew he was committing a breach of the regulations of the Penang Port Commission. We do not know if D.W. 3 had such permission and in those circumstances a doubt must have remained the benefit of which should have been given to the respondent.

I would therefore answer the reference in the negative, and would dismiss the appeal.

Reference answered in the negative.

HO CHOOI SOON v. THE INDIAN OVERSEAS BANK LTD.

[C. A. (Thomson C.J., Hill J.A. and Hepworth J.) November 25, 1960]

[Penang — F.M. Civil Appeal No. 12 of 1960]

Practice and Procedure — R.S.C. O.14 — Appeal against order giving leave to defend.

This was an appeal (from the decision of Mr. Justice Rigby reported in [1960] M.L.J. 286) against an order giving leave to defend.

Held: (1) the Court of Appeal would not interfere in such a case unless special circumstances are shown;

(2) there were no special circumstances in the present case.

Cases referred to:—

(1) *Wing* v. *Thurlow* 10 T.L.R. 151.

(2) *The Electric & General Contract Corporation* v. *The Thomson-Houston Electric Co.* 10 T.L.R. 103.

COURT OF APPEAL.

Lee Thean-Chu for the appellant.

R. D. Hume for the respondents.

Thomson C.J. (delivering oral judgment): This somewhat curious appeal is from a decision of Mr. Justice Rigby.

The plaintiff, the present appellant, issued a writ against the defendant bank on 22nd September, 1959. The claim was for a sum of $3,243.87 and the writ was specially endorsed under Order 14. In due course the Registrar gave the plaintiff leave to sign final judgment and the defendants appealed against that decision to the Judge who allowed the appeal and gave unconditional leave to defend.

That was at the beginning of February, that is to say, about 10 months ago, and it is clear that if the plaintiff had accepted that position and gone on with his action then if he had succeeded he would by this time have been enjoying the fruits of his judgment because I have no doubt the defendants being a bank would have been able to satisfy a judgment for three thousand over dollars. Instead, however, of taking that obvious course which in addition to achieving expedition would also have had the merit of keeping down the costs, he (the plaintiff) has seen fit to appeal.

I do not wish to say a word as to what I consider the attitude of this Court should be in the converse case, that is to say, the case of an appeal against an order refusing leave to defend. I make that clear because I understand we may have to express opinions on that point later to-day. But what we are concerned with here is an appeal against an order giving leave to defend, and in my opinion both justice and policy should compel us to follow what was certainly at one time the rule of the Court of Appeal in England as would appear from the case of *Wing* v. *Thurlow*[1]. That rule was that the Court of Appeal would not interfere in such a case unless special circumstances are shown.

For myself I fail to detect any special circumstances in the present case, and in thinking that there are certainly no such circumstances which would justify us in interfering I am fortified by the observations of Mr. Justice Wills in the case of *The Electric & General Contract Corporation* v. *The Thomson-Houston Electric Co.*[2] where his Lordship said that he did not think Order 14 applied to cases raising what might turn out to be a difficult question of law. Such questions could not be satisfactorily dealt with at Chambers.

In my view, in the present case, there were not only certain issues of fact on which the parties were far from being agreed but there was also a question of law on which I would express no opinion whatsoever beyond the opinion that it was not a simple straightforward question of law.

In my view, therefore, Mr. Justice Rigby was perfectly right in allowing the appeal from the Registrar and therefore in my opinion this appeal should be dismissed with costs.

Hill J.A. and **Hepworth J.** concurred.

Appeal dismissed.

SYN LEE & CO. LTD. v. BANK OF CHINA

[C. A. (Thomson C.J., Hill J.A. and Hepworth J.) November 25, 1960]

[Penang — F.M. Civil Appeal No. 13 of 1960]

Practice and Procedure — R.S.C., 1957, Order 14 — Appeal against decision refusing defendant leave to defend.

The power to sign judgment under O. 14 applies to those cases which almost on the admission of the defendant are undefended.

Therefore where the issue was whether the respondents were the holder for value of the appellants' cheques or whether they merely held them as collector for their customer could not have been decided on the affidavit evidence and the judge refused the defendant leave to defend,

Held: the appellants were entitled to defend.

Cases referred to:—

(1) *Lloyd's Banking Co.* v. *Ogle* L.R. 1 Ex. D. 262, 263, 264.

(2) *Sutters* v. *Briggs* [1922] A.C. 1, 14.

COURT OF APPEAL.

R. Ramani (*Ng Ek Tiong* with him) for the appellant.

Eusoffe Abdoolcader for the respondent.

Thomson C.J. (delivering oral judgment): In this appeal we are concerned with another aspect of the question of appeals against orders made under Order 14.

This morning we were concerned to state our attitude in the case where there was an appeal against the decision of a Judge allowing a defendant leave to defend. This afternoon we are concerned with the converse case where there is an appeal from a decision of a Judge shutting out a defendant.

With great respect it seems to me there may have been some slight misapprehension on the part of the Assistant Registrar and on the part of the trial Judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the Chancery side of the Court of trying issues on affidavit evidence. In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.

On the other hand we have to remember that the Order is there as much in the interests of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.

My own view is so well expressed in the words of Bramwell B. in the case of *Lloyd's Banking Co.* v. *Ogle*[1] that I do not find it necessary to go much further than to quote his words:—

> "The power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to cases in which the defendant might reasonably say, 'I do not know if your case is well founded or not, but I require you to prove it'."

Later on his Lordship repeated that last phrase by saying:—

> "Where a guarantor *bona fide* says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him."

In that connection and in relation to the present case it is helpful to note the following words of